No. 31765 - State of West Virginia v. Denver A. Youngblood, Jr.

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OF WEST VIRGINIA

Davis, J., dissenting:

In this proceeding, the defendant, Denver A. Youngblood, was convicted of two counts of sexual assault, three counts of wanton endangerment and one count of indecent exposure. Mr. Youngblood assigned numerous grounds for reversal and a new trial. The majority opinion rejected each assignment of error.[1] One of the issues raised by Mr. Youngblood was that the State suppressed exculpatory and impeachment evidence. I believe that this issue had merit and required reversal of the judgment and a new trial. Consequently, for the reasons set out below, I respectfully dissent.

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[1]In passing, I will note that the disposition of the stun belt assignment of error should have referenced to the recent decision in *Deck v. Missouri*, ___ U.S. ___, ___, 125 S. Ct. 2007, ___ L. Ed. 2d ___ (2005). In *Deck*, the United States Supreme Court held that:

> [T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

Deck, ___ U.S. at ___, 125 S. Ct. at 2012. I make no comment as to whether the majority's disposition of the stun belt issue was consistent with the principles set out in *Deck*.

The State Suppressed and Attempted to Destroy
Material Exculpatory and Impeachment Evidence

In this appeal, Mr. Youngblood contended that the State suppressed exculpatory and impeachment evidence. In rejecting this issue, the majority opinion cited limited facts surrounding the matter. In order to understand the true significance of the assignment of error, I will set out all the facts relevant to this assignment of error.

The offenses charged against Mr. Youngblood occurred in two settings: at his home and at the home of Joe Pitner. Several days after the offenses occurred, State Trooper Peer conducted a crime scene investigation at the home where Mr. Pitner resided. During that crime scene investigation, the owner of the home, Patricia Miles (Mr. Pitner's aunt), gave Trooper Peer a notebook that contained a writing made by one of the two girls who were with the victim, Katara, at the time of the offenses. The writing, addressed to Mr. Pitner, stated the following:[2]

> This is for Joe! Only!
> IMPORTANT
> You can read it if you want!
> How do you like what we did to your house!
> You just got played!
> In the long Run, you was the one who got f*****!
> Throw everything away in your medicine cabinet!
> Milk does a body good with TIDE!
> F*** you ***holes!!!!!

[2]I must point out that the language in the writing is highly offensive. However, I feel compelled to set out the writing as it was written, because any redaction would detract from the force of the writing's materiality.

I hope they kick you out
*Katara said Thanks for eating her p**** Denver [Mr. Youngblood]*
Hope you love the pictures
Clean the microwave
I Brushed my a** with all of yall's tooth Brushes!
Don't eat the ice cream because it has my p**** smell all in it!
Don't ever talk sh** about me because pay backs are a b****!!!
You smoked my boogers B****!

(Emphasis added).[3]

During a hearing on the post-trial motion in this case, Ms. Miles testified that Trooper Peer told her to destroy the writing. Specifically, Ms. Miles stated: "I gave him the notebook. It was in the notebook, it wasn't like this, it was in the notebook. I actually gave it to him and he read it and he said just throw everything away." Ms. Miles' statement was corroborated by her daughter, Tammy Miles, who was present at the time. Tammy stated: "He told her just to go ahead and . . . throw the notebook away." Trooper Peer testified that he did not recall the incident.

Ms. Miles, apparently believing the writing had some significance, did not throw it away. However, Mr. Youngblood did not learn about the writing until after the trial. When the writing was shown to Mr. Youngblood, he moved for a new trial based upon newly discovered exculpatory and impeachment evidence that the state suppressed and attempted

[3]Because this writing was suppressed by the State, Mr. Youngblood has not had an opportunity to determine, through a handwriting expert or an admission, which girl wrote the note.

to destroy. The trial court, without any substantive analysis, denied the motion on the grounds that it was merely "impeachment evidence which would not justify the granting of a new trial." The majority opinion tersely affirmed the trial court's ruling without performing any meaningful analysis.

One of the fundamental principles engraved in Anglo-American criminal jurisprudence is that no person should be convicted of a crime without having a fair trial. To ensure that a criminal defendant receives a fair trial, the State and Federal constitutions have guaranteed defendants specific undeniable rights. Among those constitutional rights is the guarantee that the State cannot intentionally destroy or withhold exculpatory evidence. This Court has said on several occasions that "'[i]n the context of criminal trials, it is without question that it is a constitutional violation of a defendant's right to a fair trial for a prosecutor to withhold or suppress exculpatory evidence.'" *State v. Salmons*, 203 W. Va. 561, 572, 509 S.E.2d 842, 853 (1998) (quoting *Lawyer Disciplinary Bd. v. Hatcher*, 199 W. Va. 227, 232, 483 S.E.2d 810, 815 (1997)).[4] Indeed, we held in syllabus point 4 of *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), that "[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of

[4]*See* note 7, *infra* for a discussion of a prosecutor's obligation to learn of any favorable evidence known to all persons, such as police officers working on the government's behalf.

the West Virginia Constitution." Our holding in *Hatfield* was a recognition of the pronouncement made by the Unites States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The decision in *Brady* made clear that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. *See also Illinois v. Fisher*, 540 U.S. 544, 547, 124 S. Ct. 1200, 1202, 157 L. Ed. 2d 1060 (2004) ("We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld.").[5] It has been held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).[6] Finally, "[w]hen the police

[5]A "bad faith" showing is necessary when a *Brady* violation involves "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). The facts in the instant case do not implicate the rule in *Arizona*.

[6]In the decision of *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), it was held that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1565. All that is required is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435, 115 S. Ct. at 1566.

intentionally destroy evidence, it is a natural inference that it was destroyed because it may have been exculpatory and, hence, prejudice has been caused to defendant." *State v. Schmid*, 487 N.W.2d 539, 542 (Minn. Ct. App. 1992).[7]

Applying the foregoing principles to the facts of this case clearly establishes a violation of *Brady* and its progeny.

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[7]It is not relevant for a *Brady* violation that the police, rather than a prosecutor, destroyed or suppressed material exculpatory or impeachment evidence. A violation by the police is imputed to the prosecutor. The United States Supreme Court made this point clear in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995):

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.
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> . . . Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles, 514 U.S. 419 at 437-38, 115 S. Ct. at 1567-68. *See* Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, 249 (2d ed. Supp. 2004) ("A prosecutor's Brady disclosure duty . . . includes material that is known only to police investigators and not to [the] prosecutor; an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf.")

The majority opinion points out that Katara testified that Mr. Youngblood forced her to perform oral sex on him initially at his home. After this assault took place, Mr. Youngblood left the home with Mr. Pitner. Katara and her two friends thereafter left the home and made a 911 call from a nearby home. During the 911 call, the girls reported that they had been abducted by Mr. Youngblood. After making the call, the three girls returned to Mr. Youngblood's home. Mr. Youngblood and Mr. Pitner subsequently returned. Mr. Youngblood informed the girls that he would take them back to Hagerstown. During the drive to Hagerstown, Mr. Youngblood's mother was driving her car and flashed her lights to have Mr. Youngblood pull over. Mr. Youngblood's mother informed him that she was listening to a CB-scanner and heard a report that he had abducted three girls. Neither Katara, nor the other two girls, informed Mr. Youngblood's mother that they had been abducted and that Katara had been sexually assaulted. While Mr. Youngblood's mother was speaking to him, a police officer drove up. The police officer questioned Mr. Youngblood. While this interrogation was taking place, none of the three girls informed the police officer that they had been abducted and that Katara had been sexually assaulted. The police officer, finding nothing wrong, drove off. Katara testified that Mr. Youngblood then drove to Mr. Pitner's home. While at Mr. Pitner's home, Mr. Youngblood allegedly again forced Katara to perform oral sex on him.

The bizarre facts set out above were heard by the jury and the jury convicted Mr. Youngblood. The conviction rested upon the fact that no evidence was available to

seriously draw into question whether consensual sex had occurred. However, such evidence existed. It existed in the writing that Trooper Peer told Ms. Miles to destroy. That writing indicated that, contrary to Katara's testimony, she and Mr. Youngblood both performed oral sex on each other. This was the impeachment value of the evidence.[8] This was the consensual exculpatory value of the evidence. The circuit court and the majority opinion found this evidence to be impeachment evidence only, and therefore, found it did not warrant a new trial. *Brady* and its progeny teach differently.

I believe the writing provided both exculpatory and impeachment evidence. However, assuming for the sake of argument that the writing was purely impeachment evidence, under *Brady* and its progeny, due process still required its disclosure. Professor Cleckley has pointed out that "a new trial is warranted for a *Brady* violation . . . where the defendant can establish that the prosecution failed to disclose favorable evidence, *including favorable impeachment evidence*[.]" 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* at 249 (2d ed. Supp. 2004) (emphasis added). *See also State v. Hoard*, 180 W. Va. 111, 375 S.E.2d 582 (1988) (granting new trial because state suppressed impeachment evidence). In fact, the United States Supreme Court has expressly "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes[.]" *Kyles*

[8]The majority opinion noted that there was no evidence at trial showing Mr. Youngblood performed oral sex on Katara. The evidence was nonexistent because the state concealed the evidence. That was the basis of Mr. Youngblood's argument for a new trial.

v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490 (1995). *See also Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir.1999) (noting that there are "[t]hree 'essential components' [to] a *Brady* violation . . . :(1) the evidence must be favorable to the defendant, whether directly exculpatory or of impeachment value; (2) it must have been suppressed by the state, whether willfully or inadvertently; and (3) it must be material.").

The record established after the trial unequivocally showed that, during a "crime scene" investigation, a State Trooper gave instructions to destroy crime scene evidence. I do not believe that any defendant, no matter how conclusive his/her guilt, should be the victim of the intentional destruction or suppression of favorable material evidence. Our system of justice simply cannot operate in this manner if it is truly to be a system of justice. *See State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995) (reversing a first degree murder conviction because the state destroyed potentially useful defense evidence).

In view of the foregoing, I respectfully dissent.